Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)

HIGH COURT (KUALA LUMPUR)
ABDUL MALIK ISHAK J
17 JULY 2007

Civil Procedure — Functus officio — Principles of — Every point in dispute not considered before judgment was given — Whether this would mean judge not functus officio and could re-open case — Distinction between inter partes and ex parte applications — Exceptions to doctrine of functus officio

Civil Procedure — Judgments and orders — Amendment of — Variation or revocation of order of court — Whether court could make an order to vary or revoke an earlier order made on an ex parte application — Whether liability of defendant crystallized as required by rules — Rules of the High Court 1980 O 28 r 4(1

Civil Procedure — Jurisdiction — Inherent jurisdiction of court — Nature and extent of such jurisdiction — Whether doctrine of functus officio can abrogate inherent jurisdiction of courts — Rules of the High Court 1980 O 92 r 4

Statutory Interpretation — Construction of statutes — Ambiguity — No date of coming into operation of Act of Parliament — Consequences of such if said Act used in matters of adjudication — Whether provision in statute should be read retrospectively or prospectively — Mental Health Act 2001 (Act 615)

The plaintiffs are the wife and daughter of the defendant. They had applied ex parte to the court for certain orders pertaining to the person and estate of the defendant. The court made orders pursuant to provisions in the Mental Health Act 2001 (Act 615) ('the said Act'). It was later discovered that the said Act did not have a date of coming into operation of its provisions at the time the said orders of court were made. The plaintiffs then applied by the present originating summons to vary or revoke the said orders so as to bring the orders of the court within the ambit of the Mental Disorders Ordinance 1952. The court then had to consider whether it was functus officio after the earlier defective orders had been made. The court also had to consider whether the inherent jurisdiction of the court enabled it to correct the said orders. In the course of considering the avenues open to it to rectify the said orders, the court discovered that the said Act had no provision in it to clarify whether its provisions were retrospective or prospective.

Held, allowing the application:

(1) The inherent jurisdiction of the courts as provided for in O 92 r 4 of the Rules

of the High Court 1980 ('the RHC') is exercised as part of the administration of justice. It is procedural in nature and is not part of substantive law. It is invoked in an inexhaustible variety of circumstances. This inherent power of the court is applicable in the current case to rectify the orders which were made under the said Act which had not yet come into operation so that the orders may now be brought within the ambit of the Mental Health Ordinance 1952 (see paras 28–29).

(2) The doctrine of functus officio did not and could not abrogate a judge's inherent powers. Thus a judge can review his own decision in the event of an oversight or an error in his decision as the justice of the case demands (see para 32).

(3) The doctrine of functus officio will give finality to a decision but there are exceptions to the doctrine and one of the exceptions is where the order is made in the absence of a party at the hearing: O 28 r 4(1); O 32 r 6; O 35 r 2 of the RHC (see para 31); *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618 followed.

(4) As the said orders were made in the absence of the defendant, O 28 r 4(1) allowed the said orders to be varied or revoked by a subsequent order of the court even though the said orders had been perfected (see para 35).

Obiter:

It must be borne in mind that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect (see para 5).

[Bahasa Malaysia summary

Plaintif-plaintif adalah isteri dan anak perempuan defendan. Mereka telah memohon secara ex parte kepada mahkamah untuk perintah-perintah tertentu berkaitan defendan dan harta pusakanya. Mahkamah telah membuat perintah-perintah menurut peruntukan-peruntukan dalam Akta Kesihatan Jiwa 2001 (Akta 615) ('Akta tersebut'). Akta tersebut kemudiannya telah didapati tiada tarikh mula penguatkuasaan peruntukan-peruntukannya pada masa perintah-perintah mahkamah dibuat. Plaintif-plaintif seterusnya telah memohon saman pemula ini untuk mengubah atau membatalkan perintah-perintah tersebut untuk membawa perintah-perintah mahkamah tersebut dalam skop Ordinan Sakit Otak 1952. Mahkamah kemudian perlu menimbangkan sama ada ia adalah functus officio setelah perintah-perintah terdahulu defektif itu dibuat. Mahkamah juga perlu menimbangkan sama ada bidang kuasa mahkamah membolehkannya memperbetulkan perintah-perintah tersebut. Dalam proses menimbangkan cara yang terdapat untuk memperbetulkan perintah-perintah tersebut, mahkamah mendapati Akta tersebut tiada peruntukan dalamnya untuk menjelaskan sama ada peruntukan-peruntukannya adalah kebelakangan atau prospektif.

(1) Bidang kuasa sedia ada mahkamah sepertimana yang diperuntukkan dalam A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') digunapakai sebagai sebahagian daripada pentadbiran keadilan. Ia bersifat prosedur dan bukan

sebahagian daripada undang-undang substantive. Ia digunakan dalam pelbagai keadaan. Kuasa sedia ada mahkamah ini terpakai dalam kes semasa untuk memperbetulkan perintah-perintah yang dibuat di bawah Akta tersebut yang mana belum berkuat kuasa agar perintah-perintah tersebut boleh kini dirangkumkan dalam skop Ordinan Sakit Otak 1952 (lihat perenggan 28–29)

(2) Doktrin functus oficio tidak boleh memansuhkan kuasa sedia ada hakim. Oleh itu seorang hakim boleh menyemak semula keputusannya sekiranya berlaku kealpaan atau kesilapan dalam keputusannya sepertimana dituntut demi keadilan kes itu (lihat perenggan 32).

(3) Doktrin functus officio memberikan kemuktamadan kepada keputusan namun terdapat pengecualian kepada doktrin itu dan salah satu pengecualian itu adalah di mana perintah dibuat dalam ketiadaan pihak semasa perbicaraan: A 28 k 4(1), A 32 k 6, A 35 k 2 KMT (lihat perenggan 31); *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618 diikut.

(4) Memandangkan perintah-perintah tersebut telah dibuat dalam ketiadaan defendan, A 28 k 4(1) membenarkan perintah-perintah tersebut diubah atau dibatalkan oleh perintah mahkamah yang selanjutnya meskipun perintah-perintah tersebut telah diperbaiki (lihat perenggan 35).

Obiter:

Hendaklah diingat bahawa setiap statut adalah prima facie prospektif kecuali ia dijelaskan atau disebabkan implikasi yang perlu dibuat untuk memberinya kesan kebelakangan (lihat perenggan 5).]

Notes

For a case on principles of functus officio, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2833.

For cases on amendment of judgments and orders, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4017–4026.

For cases on ambiguity, construction of statutes, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1838–1841.

For cases on inherent jurisdiction of court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4529–4544.

Cases referred to

Associated General Contractors of America, Inc and the Carpenters Local Union No 1334, 58 LA 162 (refd)

City of St Charles v Stookey 154 F 772, 780 (CA-8, 1907 (refd)

Colonial Sugar Refining Company Limited, The v Irving [1905] AC 369 (refd)

Connelly v DPP [1964] AC 1254 (refd)

Cracchio v Carlucci 62 Ariz 284, 157 P 2d 52 (refd)

Doucet-Boudreau v Nova Scotia (2003) 3 SCR 3 (refd)

Frederick v Margaarth 221 Pa 418, 70A 797 (refd)

Jackson v Kentucky Mills, Inc 77 F Supp 53 (SD NY) 1948 (refd)

Jayasinghe v Minister For Immigration And Ethnic Affairs and Another (1997) 145 ALR 532 (refd)

Kerajaan Malaysia v Wong Pot Heng & Anor [1997] 1 MLJ 437 (refd)

Land etc Co Ltd v King 30 CLR 523 (refd)

Lee Chow Meng v PP [1978] 2 MLJ 36 (refd)
Lee Gee Pheng v RHB Bank Bhd [2004] 1 MLJ 618 (refd)
Lee Phet Boon v Hock Thai Finance Corp Bhd [1994] 2 MLJ 448 (refd)
Leung and Another v Minister For Immigration And Multicultural Affairs (1997) 150 ALR 76 (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)
Loyal Band or Group of Creek Indians v US 97 F Supp 426, 531 (Court of Claims, 1951) (refd)
M/s Punjab Tin Supply Co v Central Government AIR 1984 SC 87 (refd)
Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors [1994] 1 MLJ 704 (refd)
Mand v Patterson (1898) 19 Ind App 619 (refd)
Mercury Oil Refining Co v Oil Workers International Union C10, 187 F 2d. 980, 985 (CA-10, 1951) (refd)
Miroslav Jovanovic v The Queen (1999) FCA 1008 (refd)
Mohd Jamil Ahmad v Suraj Narain ILR 29 Pat 400 (refd)
Mohd Rashid Ahmed v State of Uttar Pradesh AIR 1979 SC 592 (refd)
Motor Emporium, The v Arumugam [1933] MLJ 276 (refd)
NV Sumatra Tobacco Trading Co v PT Sampoerna JL Sdn Bhd [1997] 3 CLJ 946 (refd)
Narsing Rao v Shankar Saran AIR 1958 All 775 (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99 (refd)
New Singhal Dal Mill v Sheo Prasad AIR 1958 All 404 (refd)
Nilakantha Misra v Collector (1987) 63 Cut LT 75 (refd)
Pirbux v Babulal AIR 1987 MP 18 (refd)
Proodos Marine Carriers Co (Overseas Shipping and Logistics) 578 F Supp 207 (SDNY 1984) (refd)
R v Jefferies [1968] 3 WLR 830; [1968] 3 All ER 238 (refd)
Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated (2004] 2 MLJ 49 (refd)
Tan Guek Tian & Anor v Tan Kim Kiat [2007] 8 CLJ 215 (refd)
Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat [2007] 3 MLJ 521 (refd)
Tan Guek Tian (f) & Anor v Tan Kim Kiat @ Chua Kim Kiat [2007] 3 AMR 758 (refd)
United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546 (refd)
WEA Records Ltd v Visions Channel 4 Ltd and Others [1983] 2 All ER 589; [1983)] 1 WLR 721; [1984] FSR 404 (refd)
Wan Chon v Chua Ka Bu [1990] 2 MLJ 460 (refd)
West v Gwynne [1911] 2 Ch 1 (refd)
Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885 (refd)
Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1 (refd)

Legislation referred to

Mental Disorders Ordinance 1952

Mental Health Act 2001 (Act 615) s 1(2)
Rules of the High Court 1980 O 28 r 4(1), O 92 r 4

Abdul Malik Ishak J (now JCA):

HISTORICAL BACKGROUND TO THE PRESENT APPLICATION IN ENCL 10

[1] This is a sequel to the first judgment which has since been reported and it has been reported in the three popular local law journals, namely:

(a) *Tan Guek Tian & Anor v Tan Kim Kiat* [2007] 8 CLJ 215;

(b) *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat* [2007] 3 MLJ 521; and

(c) *Tan Guek Tian (f) & Anor v Tan Kim Kiat @ Chua Kim Kiat* [2007] 3 AMR 758.

[2] In the first judgment, the Mental Health Act 2001 (Act 615) ('the said Act 615') plays a prominent role in adjudicating encl one (1). It now transpires that the said Act 615 has not come into operation because the Minister charged with the responsibility for health has not appoint by notification in the gazette the date of the coming into operation of the said Act 615. Section 1(2) of the said Act 615 sets out the commencement date and checks with the government gazette revealed that no such commencement date had been published. Further checks with the CLJ online version of the said Act 615 revealed that it is not yet in force. There is a real risk that other legal practitioners and litigants in Malaysia would rely on the first judgment as reported in order to make similar applications like encl one (1) pursuant to the said Act 615 bearing in mind that the said Act 615 is currently in circulation to members of the public. The continued reliance on the said Act 615 on the assumption that it is in force would cause confusion and stifle the modern development of the law relating to mental disorders.

[3] It is hoped that the Minister charged with the responsibility for health would take heed of the current unsatisfactory predicament of the said Act 615 which received the Royal Assent on 6 September 2001 but remains unenforceable to date. The printed copy of the said Act 615 by the 'Percetakan Nasional Malaysia Berhad, Kuala Lumpur branch' carries the following legend: 'Date of publication in the Gazette ….. 27 September 2001'. That only adds confusion as to whether the said Act 615 has come into force. This judgment is written to de-fuse that confusion. I reiterate that the said Act 615 is still not in force as at the date of the writing of this judgment.

[4] It is germane to mention that the said Act 615 is silent as to whether it is to apply prospectively or retrospectively. With respect, the said Act 615 ought to be reviewed and its intention specified with some measure of certainty. In the event that the said Act 615 is only intended to affect matters of procedure, it ought to apply retrospectively and if it would affect a vested right then it ought to apply

prospectively. According to Zakaria Yatim J (as he then was) in *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704, p 710:

> An amending statute could not be construed retrospectively if it affected any right that existed before the amendment. A statute could not be construed retrospectively if it had the effect of making a contract valid which, as the law stood at the time it was executed, was not valid. If the amending statute had the effect of altering a substantive law or removing a substantive right, it should not be construed retrospectively.

And in *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* (2004] 2 MLJ 49, Mokhtar Sidin JCA, delivering the judgment of the Court of Appeal, referred to the following authorities on retrospectivity:

(a) *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99;

(b) *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1;

(c) *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1;

(d) *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36;

(e) *The Colonial Sugar Refining Company Limited v Irving* [1905] AC 369; and

(f) *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437 (FC).

[5] 'Retrospective' simply means looking backwards. It refers to a state of things that exist before the Act comes into operation. Thus, a retrospective statute contemplates the past and gives some different legal effect from that which it had under the law when it occurred or transpired. Cooley in his book *Constitutional Limitations* at p 771 categorically states that a retrospective law is a law which reaches back to and gives to a prior transaction some different legal effect from that which it had under the law when it took place. If a statute provides that as at the past date the law shall be taken to have been that which it was not, that statute is deemed to be retrospective (per Lord Wrenbury in *West v Gwynne* (1911) 2 Ch 1, p 12; South Australia Land, etc *Co Ltd v King* 30 CLR 523, p 546; *Mohd Jamil Ahmad v Suraj Narain ILR 29 Pat 400* ; and *New Singhal Dal Mill v Sheo Prasad AIR* 1958 All 404, 407, 408). Now, whether a statute operates prospectively or retrospectively would be dependent on the intention of the legislature. If the words employed in a statute are clear and unambiguous and it is clearly manifest that the legislature intended the statute to operate retrospectively, then it must be so construed (*Mohd Rashid Ahmed v State of Uttar Pradesh* AIR 1979 SC 592, p 598). But if the terms of the statute do not make the intention certain or clear, then the statute will be presumed to operate prospectively (*Mohd Rashid Ahmed v State of Uttar Pradesh*). It must be borne in mind that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. This simple rule of interpretation is also applicable for the purpose of interpreting the Constitution (*Narsing Rao v Shankar Saran* AIR 1958 All 775, 786; *Nilakantha Misra v Collector* (1987) 63 Cut LT 75; and *Pirbux v Babulal* AIR 1987 MP 18). Another salutary principle is this. That all laws which generally affect substantive rights operate prospectively. And there is also a supplementary rule which states that there is a presumption against

retrospectivity if the statute affect vested rights and obligations unless the legislature is clear and manifest (*M/s Punjab Tin Supply Co v Central Government* AIR 1984 SC 87).

[6] So, in order to right the wrong, the plaintiffs filed an ex parte summons in chambers in encl 10 and sought for the following orders:

1 All reference to the Mental Health Act 2001 (Act 615) in the ex parte order dated 10 January 2007 be varied, altered, substituted and/or amended to reflect the corresponding sections in the Mental Disorders Ordinance, 1952;

2 That all relevant cause papers filed in this suit be deemed to have been varied, altered, substituted and/or amended to reflect the corresponding sections in the Mental Disorders Ordinance 1952;

3 That the reliefs granted in the ex parte order dated 10 January 2007 be re-affirmed accordingly and/or all lawful acts of the plaintiffs' and 3rd Parties in reliance of the ex parte order dated 10 January 2007 be validated;

4 The plaintiffs' be at liberty to apply;

5 Such further and/or other reliefs deemed fit and appropriate by this honourable court.

I heard encl 10 on 16 July 2007 and I gave the orders as sought for in prayers (1), (2), (3) and (4). My reasons now follow.

THE PERTINENT FACTS

[7] The defendant who is the father and husband to the first and the second plaintiffs respectively had been diagnosed by Dr Ng Li Ling, a senior consultant of psychological medicine at the Changi Hospital in Singapore, to be suffering from dementia with schizophrenia and focal epilepsy and found to be of unsound mind and incapable of managing his person and affairs on 21 April 2005. Dr. Chiam Peak Chiang, a senior consultant psychiatrist with the Institute of Mental Health, Woodbridge Hospital, Singapore examined the defendant and found him to be suffering from an incurable moderately severe dementia which impairs his intelligence, judgment and ability to take care of himself on 1 August 2006. In short, the defendant is mentally disordered.

[8] Andrew Ang J, of the High Court of Singapore, inter alia, declared the defendant to be of unsound mind and incapable of managing his person and affairs. This was on 24 August 2005.

[9] All these salient facts formed the subject matter of the originating summons in enclosure one in the present suit filed pursuant to the said Act 615. And pursuant to an ex parte order dated 10 January 2007 made in the absence of the defendant, this court as reflected in the first judgment declared, inter alia, that the defendant to be mentally disordered and incapable of managing his person and affairs. The plaintiffs' were appointed the committee of the person and estate of the defendant pursuant to s 58 of the said Act 615. The plaintiffs too were granted leave to sell the defendant's

3/18 share of a plot of land in Malacca and to sign the documentation relating to the same and to apply the proceeds towards the defendant's medication and lodging expenses at the dementia specific nursing home in Singapore where the defendant resides as well as the expenses of his family members.

[10] Pursuant to a sale and purchase agreement dated 6 April 2007 executed together with the other seven co-owners, the plaintiffs have since sold off the defendant's 3/18 undivided share of the land in Malacca to a third party ('SPA'). The terms of the ex parte order dated 10 January 2007 as reflected in the first judgment appointing the plaintiffs as committee of the person and estate of the defendant were incorporated into the recital of the SPA and the ex parte order dated 10 January 2007 was also annexed thereto. The solicitors for the vendors had on 12 July 2007 notified the solicitors of the plaintiffs via telephone to the effect that the deposit for the purchase of the land in Malacca had been paid and the balance of the purchase price too had been paid.

[11] The ex parte order of this court dated 10 January 2007 as reflected in the first judgment has since been perfected and relied upon by the plaintiffs and the third party purchaser of the land in Malacca. In order to remedy the situation, the plaintiffs promptly filed the present application in encl 10.

FUNCTUS OFFICIO

[12] Now, as I said, the ex parte order of this court dated 10 January 2007 as reflected in the first judgment had been formally drawn up and perfected. This necessitates an analysis as to whether this court is still seised with jurisdiction to review the said order. According to the case of *Cracchio v Carlucci* 62 Ariz 284, 157 P 2d 52, and the case of *Frederick v Margaarth* 221 Pa 418, 70A 797, for an award to be final it must cover every point in dispute. And what is the new point here. It is the fact that the said Act 615 is not yet in force when encl one (1) was decided by me on 10 January 2007.

[13] According to KJ Aiyar's *Judicial Dictionary* (13th Ed) at p 435, the latin phrase 'functus officio' is defined in this fashion:

> As soon as the registering officer registers a document presented to him for registration, the function, in the performance of which the document was produced before him, is over, and, thereafter, becomes functus officio, having no power, under section 33 to impound the instrument (*Kamal Chand v State* AIR (1966) MP 20, (1965) MPLJ 606, (1965) Jab LJ 656).

[14] I will now refer to the case of *Leung and Another v Minister For Immigration And Multicultural Affairs* (1997) 150 ALR 76, a decision of the Federal Court of Australia with a coram of Beaumont, Heerey and Finkelstein JJ. There, Finkelstein J, had this to say (see p 84 of the report):

> The origin of the principle of functus officio as that expression is currently employed is to be found in the latter part of the last century in England when it was decided that a final decision of a court could not be reopened. The reason given was that the power to reopen

a dispute had been transferred to the court of appeal: *Re St Nazaire Co* (1879) 12 Ch D 88. The rule applied only after the formal judgement of court had been passed and entered and was subject to two exceptions, viz where there had been a slip in drawing it up and where there had been an error in expressing the intention of the court: *Re Swire* (1885) 30 Ch D 239; *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Ainsworth v Wilding* [1896] 1 Ch 673. According to *Jowett's Dictionary of English Law* (2nd Ed, 1977) the principle applies to a judge, a magistrate or an arbitrator who has given his decision or made an award.

A similar rule applies to the exercise of a statutory power or function but for a different reason. If a statute confers a power or a function, once that power has been exercised or the function performed the purpose for its creation has been fulfilled with the consequence that the power or function is exhausted. In Blacks Law Dictionary (5th Ed, 1979) 'functus officio' is defined as 'a task performed' and it is applied to 'an instrument, power agency etc which has fulfilled the purpose of its creation and is therefore of no further effect or virtue'.

Continuing at p 88 of the report, his Lordship Finkelstein J., succinctly said:

But what if the decision is invalid? Can the decision be ignored if the consent of all interested parties is obtained or is there some other principle that governs the situation? In my opinion, the true principle is this. To ignore an invalid decision is not to revoke it. It is merely to recognise that that which purports to be a decision does not have that character. To decide the matter again is not a reconsideration of it. It is in fact the original exercise of the power to make the decision. Hence, the rule embodied in the expression 'functus officio' has no application to such a case. Nor is there any need to find either an express or an implicit power of reconsideration. Those doctrines, to the extent that they are applicable to administrative decision-making, only apply to validly made administrative decisions.

[15] Again in the Federal Court of Australia with a coram of Wilcox, Miles and Weinberg JJ in the case of *Miroslav Jovanovic v The Queen* (1999) FCA 1008, the following principles of law on 'functus officio' were set out as follows:

15 As a general rule, except by way of appeal, a court has no power to review, rehear, vary or set aside any judgment or order once it is formally recorded.

16 The underlying principle was elucidated by Jordan CJ in *Graziers Association of New South Wales v Australian Legion of Ex-Servicemen and Women* (1949) SR(NSW) 300. His Honour stated at p 303:

Prior to the Judicature Acts in England, judges in Chancery could re-hear their own decisions and those of their respective predecessors, and such re-hearings were, in effect, appeals from the former hearings; but no such jurisdiction existed at common law, except that a judgment of the court was amendable in the term in which it was made but not afterwards … The Judicature Acts in effect abolished the jurisdiction to re-hear in Chancery … The general rule, as established by the authorities to which reference is made in *Ex parte Hassell* [(1937) 37 SR 192 at p 195] is that 'when an arbitrator or judicial officer has given his award or adjudication, as the case may be, he is functus officio, and cannot add to, amend, or detract from what he has done'; although in some jurisdictions an adjudication is not regarded as having been finally made until it has been passed and entered … This rule applies to judges exercising judicial authority conferred by statute, unless otherwise provided by statute. Thus, it applies to District Courts… There is no reason why it should not apply to the adjudications of magistrates made in the exercise of statutory civil jurisdiction. Whatever may be the position of a magistrate with respect

> to a warrant for apprehension issued by him in an administrative capacity, there is nothing … which suggests that he has any inherent jurisdiction to review an adjudication, or vary a warrant for execution, made or issued by him in the exercise of a statutory civil jurisdiction, or can make any such review or variance unless authorised to do so by statute …

17 In *Bailey v Marinoff* (1971) 125 CLR 529 at p 539 Gibbs J, as his Honour then was, observed:

> The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing.

18 In civil cases, before a judgment or order has passed into record, the judge who gave the judgment or made the order may reconsider the decision and withdraw, alter, or vary it: *Carroll v Price* [1960] VR 651 at p 657. After a judgment or order has been formally entered in the records of the Court or, to use the language which is sometimes invoked, 'authenticated', the judge is said to be functus officio.

19 This general rule does not apply to an order made ex parte, which may be set aside or varied on the application of any party affected by it.

[16] The question as to whether a tribunal has the power to re-consider or re-open a decision on a review determining the substantive application was considered by Goldberg J, in the Federal Court of Australia's case of *Jayasinghe v Minister For Immigration And Ethnic Affairs and Another* (1997) 145 ALR 532. There, at p 542 of the report, his Lordship had this to say:

> Mr Niall submitted that the doctrine of functus officio was a legal technicality primarily directed to the exercise of judicial power which should yield to the requirement that the tribunal provide a mechanism of review that is fair, just, economical and quick: s 420(1). I do not consider it a correct characterisation of the doctrine of functus officio to call it a 'legal technicality'. Rather it is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform: *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 at 225; *Comptroller-General of Customs v Kawasaki Motors Pty Ltd* (1991) 32 FCR 219 at 225 103 ALR 661.
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> This consequence was recognised by Mr Downing who submitted that once a decision on the merits was made by the tribunal its power was spent and that any further decision to reopen that decision on the merits was ultra vires. He relied upon the judgment of Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 92 ALR 93 at 112 where his Honour said:
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> > The result is that, when the decision-maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue.

[17] When you talk about the doctrine of functus officio you are referring to a situation where a party requests that he re-opens his hearing for one reason or

another. In re-opening arbitration awards, for instance, the following cases are germane to the occasion.*Mand v Patterson* (1898) 19 Ind App 619 was an early case where the doctrine of functus officio was applied to arbitration. It involved an action for dissolution of a partnership. A dispute over final distribution of accounts was submitted to arbitration and in upholding the award, the court held that when the award was made known to both parties, the arbitrator:

> became 'functus officio,' and any action he may have taken thereafter was a nullity and could not change the findings or in any way affect the relative rights of the parties. So far as the controversy was concerned, he became a stranger.

[18] In *City of St Charles v Stookey* 154 F 772, 780 (CA-8, 1907), the court was concerned with a dispute over whether a contractor was entitled to the balance of the agreed-upon contract price for the construction of a water works. The court affirmed the district court opinion which upheld the award and aptly said:

> The power of an arbitrator is gone after his final decision, and he may not subsequently modify, revoke, or annul it or make a new award upon the same issues.

[19] In *Jackson v Kentucky Mills, Inc* 77 F Supp 53 (SD NY) 1948, affirmed and reported in 170 F 2d 703 (CA2-1948), a New York judgment entered upon an award of an arbitrator had not been enforced by the district court of the eastern district of Kentucky because of the lack of jurisdiction over the non-resident. On a fresh application to the New York Supreme Court, the arbitrator was reinstated to pass on this question. But, the New York Federal District Court, in an opinion affirmed per curiam, assumed jurisdiction because of diversity of citizenship and held that:

> '… the power of the arbitrator to act at all ceased after the making of the 'first award'.

Mercury Oil Refining Co v Oil Workers International Union C10, 187 F 2d. 980, 985 (CA-10, 1951) was a labour case. There the union brought an action to enforce an award on a discharge. The company considered the award ineffective and wished to enforce a prior award made by the same arbitration panel. The district court vacated both the awards and directed that a new arbitration be conducted. In affirming the decision, the circuit court said:

> It is a general rule in common law arbitration that when arbitrators have executed their awards and declared their decisions they are 'functus officio' and have no power to proceed further.

[20] The circuit court reversed that part of the decision of the district court directing that a new arbitration be held. The circuit court was of the view and it felt that the parties had not indicated that they desired any further arbitration and that there was no reason why this should be forced on them against their wishes.

[21] In *Loyal Band or Group of Creek Indians v US 97 F Supp 426, 531 (Court of Claims,* 1951), an appeal was taken from an award of the Indian Claims Commission denying the Indians $600,000. The Court of Claims reversed the award of the Commission and said that:

> The soundness of the generally accepted doctrine that once an arbitrator has made his award, the rights of the parties to that award are vested and cannot be destroyed by a later modification of his award is well illustrated.

[22] It is ideal to mention that under California law (see California Code of Civil Procedure, part 3, title 9, section 1284 (Supplement 1961)) it is possible to make an application to the arbitrators for modification or correction of an award, and such an application must be made within ten days of receipt of the award. That would be in the nature of a statutory inroad into the doctrine of functus officio in California.

[23] An arbitrator by the name of Jenkins who heard the case of *Associated General Contractors of America, Inc and the Carpenters Local Union* No 1334, 58 LA 162 aptly stated that:

> As a general rule, a final determination of submitted questions exhausts the powers of arbitrators and therefore the matter is beyond their control. They have no power to recall, reconsider, amend or otherwise alter the award. This general rule, however, does not apply where the arbitrator has failed to consider a portion of the dispute submitted.

[24] It must be emphasised that when a hearing is closed as a result of an oversight or because of mutual mistake of fact by the arbitrator as well as the parties, it is not to be regarded as closed and any correction of such an error is well within the discretion of the arbitrator.

[25] There is a general principle of law which states that an arbitration panel appointed under a broad arbitration clause in a long-term contract retains jurisdiction to resolve disputes which arise during the life of the contract. This general principle of law is culled from the case of *Proodos Marine Carriers Co (Overseas Shipping and Logistics)* 578 F Supp 207 (SDNY 1984). In that case Proodos and Overseas Shipping ('OSL') entered into a contract of affreightment under which OSL chartered certain vessels for shipment of pipe from the United States to Africa. The contract contained an arbitration clause providing for a tripartite party-appointed panel. A dispute arose over the calculation of freights and delivery of bills of lading, and the matter was submitted to arbitration. Proodos, although notified of the hearing, did not participate. After considering the evidence presented by a representative of OSL, the arbitration panel issued a partial final award ordering Proodos to deliver the requested bills of lading. Proodos immediately complied with the award. A second dispute arose over the same issue, however, involving a different vessel. Proodos nominated an arbitrator, expecting the arbitration to proceed before a different panel. OSL maintained that the original panel should hear the dispute. Proodos then filed an action seeking to compel arbitration before a new panel. OSL crossmoved to confirm the original partial final award and to limit the scope of future arbitrations between the parties to issues other than freight calculation and bills of lading. Although the court agreed with Proodos that the original panel effectively disposed of all issues before it, it concluded that the original panel retained jurisdiction. The court stated that the principle of res judicata foreclosed any further dispute over the freight calculation during the life of the contract between the parties. It further ruled that retention of the original panel members, who were 'familiar with

the underlying contract and prior disputes,' did not contravene the doctrine of functus officio rather, it promoted the expediency of arbitration.

[26] I wonder whether the doctrine of functus officio has outlived its usefulness. The rationale for having the doctrine is two folds. Firstly, it will prevent the adjudicators be it arbitrators or judges from exercising a fresh judgment on the case and altering their award or decision. Secondly, it prevents re-examination of an issue by the adjudicators be it arbitrators or judges when they have decided on them. I must say that this doctrine of functus officio is so well-known that it has achieved notoriety of a sort and it is often repeated in many judgments but rarely analysed. The inherent power of a judge would enable the judge to deal with any error once it is pointed out to him. The justice of the case demands it. In my considered view, the doctrine of functus officio did not and could not abrogate the judges' inherent powers. These are certainly words of encouragement. Surely a judge can review his own decision when the judge has overlooked a crucial point or dealt with that crucial point in an incomplete fashion or simply made an error. Here, in filing enclosure 10, the plaintiffs are asking this court to invoke its inherent powers to vary, alter, substitute and/or amend the ex parte order of this court dated 10 January 2007 in order to reflect the corresponding sections of the Mental Disorders Ordinance 1952 as opposed to the said Act 615. Surely, I am entitled to do so. The parties have acted accordingly pursuant to the ex parte order dated 10 January 2007 that was made under the said Act 615. Enclosure 10 seeks, inter alia, for the reliefs granted in the ex parte order dated 10 January 2007 to be re-affirmed accordingly in accordance with the provisions of the Mental Disorders Ordinance 1952. It is rather obvious that encl 10 was filed in order to prevent a miscarriage of justice. I cannot ruefully sit back knowing, after being appraised, of the fact that the said Act 615 has not been in force when I adjudicated encl one (1). I must be permitted to correct errors given the unusual circumstances that presented itself. But a note of warning though. This judgment should not be read carte blanche as allowing alteration of decisions previously rendered.

[27] On the facts of this case, I am entitled to call in aid and invoke O 92 r 4 of Rules of the High Court 1980 ('RHC') which reads as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

It is salutary to mention that O 92 4 of the RHC brings into sharp focus the inherent jurisdiction of the High Court. Terrel Acting CJ in the famous case of *The Motor Emporium v Arumugam* [1933] MLJ 276, p 278 explained lucidly the meaning to the phrase 'inherent jurisdiction'. His Lordship said that the court:

> Has the widest possible jurisdiction in all suits, matters and questions of a civil nature, and although the legislature has given no indication on what principles such jurisdiction should be exercised, every Court must have inherent jurisdiction to do justice between the parties and apply such principles as are necessary or desirable for attaining such object and for giving decisions which are in conformity with the requirements of the social conditions of the community where the law is administered.

[28] What is the true nature of the inherent jurisdiction of the court? It is difficult to advance a simple answer. There are a number of features that can readily be identified. It is a correct assertion to make when we say that the inherent jurisdiction of the court is exercisable as part and parcel of the process of the administration of justice. It is procedural in nature and it is applicable to both civil and criminal cases (*Connelly v DPP* [1964] AC 1254; and *R v Jefferies* [1968] 3 WLR 830; [1968] 3 All ER 238). It is not part of the substantive law and it is usually invoked when the parties are in the midst of litigation. What is of importance is this. That the glaring and distinctive feature of the inherent jurisdiction of the court is that it can be exercised in a summary process — at any time. It is part and parcel of the machinery of justice. It is an armament that can be used in any fact situation. It may be invoked not only in relation to the parties in pending proceedings but also in relation to anyone, whether a party or not, and in respect of matters that are not raised as issues in the litigation between the parties. Thus, it can be said that the inherent jurisdiction of the court may be invoked in an inexhaustible variety of circumstances and may be exercised in different ways and manners. It has the capacity to diversify. It is very viable. The ongoing viability of the inherent jurisdiction of the court can never be doubted.

[29] I will certainly apply the inherent jurisdiction of this court in adjudicating encl 10.

[30] The ex parte order dated 10 January 2007 was secured in the absence of the defendant and the requirement to serve the application in encl one (1) upon him had been waived due to the defendant's inability to understand the nature of the proceedings because of his mental incapacity as well as his incapacity to travel from the nursing home in Singapore to Kuala Lumpur. It must also be borne in mind that the defendant's family members consented to the application in encl one (1).

[31] While recognising that the doctrine of functus officio will thwart any attempt at destabilising a final decision and that finality is a precious commodity in the Malaysian system of justice and that the doctrine will preserve a final decision against sieges by rebuffed litigants yet there are exceptions to the doctrine. Nik Hashim JCA (now FCJ) in *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618 (CA), aptly said at p 624 of the report:

> [14] It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is functus officio. The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exceptions which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:
>
> (i) to correct errors in expressions of the intention of the court (the slip rule) pursuant to O 20 r 11 of the RHC;
>
> (ii) where the order is made in the absence of a party at the hearing: O 28 r 4(1); O 32 r 6; O 35 r 2 of the RHC;
>
> (iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374;

(iv) where the order contravenes a substantive statutory provision rendering it defective on grounds of illegality or lack of jurisdiction; and

(v) where the justice of the case requires the court to correct a serious defect in the order: *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; *Selvam Holdings (M) Sdn Bhd v Grand Kenyon & Eckhardt Sdn Bhd;(BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201.

[32] Sir John Donaldson MR writing a separate judgment for the Court of Appeal in the case of *WEA Records Ltd v Visions Channel 4 Ltd and Others* [1983] 2 All ER 589; [1983)] 1 WLR 721; [1984] FSR 404, succinctly said (see p 593 of the All ER reporting, p 727 of the WLR reporting, and p 409 of the FSR reporting):

> Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6.

Further down the same page, this was what his Lordship said:

> As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see RSC Ord 35, r 2 and *Vint v Hudspith* (1885) 29 Ch D 322, to which counsel for the defendants very helpfully referred us this morning.

[33] The position is also the same in Canada. There the majority of the Supreme Court in Canada in *Doucet-Boudreau v. Nova Scotia* (2003) 3 SCR 3 at para 81, per Iacobucci and Arbour JJ., noted that it is not uncommon for civil procedure rules in Canada to allow courts to vary or add to their orders or even to provide other or further relief than originally granted and that r 59.05 is such a civil procedure rule. The same Judges went on to say that this practice of providing further remedies in support of a decision does not undermine the availability of an appeal.

[34] It is part and parcel of my judgment that this court has the full jurisdiction to entertain the present application in encl 10 in order to vary, alter, substitute and/or amend the ex parte order dated 10 January 2007 due to the non-final or provisional nature of the said order and the fact that it was obtained in the absence of the defendant. It is also my judgment that this court is not functus officio and has the full powers or jurisdiction to vary or revoke the said ex parte order by virtue of O 28 r 4(1) of the RHC which reads as follows:

A 4. (1) The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

B

[35] The liability of the defendant has crystallised in the sense that he has been declared mentally disordered and incapable of managing his person, affairs and estate. The plaintiffs have been appointed as a committee of the defendant's person and estate with leave being granted to, inter alia, sell off the defendant's 3/18th share in a plot of land in Malacca and utilise the proceeds towards his medical and lodging expenses at the nursing home in Singapore. All these were secured in the absence of the defendant. The following authorities, namely:

C

(a) *United Malayan Banking Corpn Bhd v Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546;

D (b) *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448; and

(c) *NV Sumatra Tobacco Trading Co v PT Sampoerna JL Sdn Bhd* [1997] 3 CLJ 946.

vigorously applied O 28 r 4(1) of the RHC to their peculiar facts and held that the courts had jurisdiction to review its own ex parte orders even if it had been perfected.

E

[36] An injustice would remain so long as the ex parte order dated 10 January 2007 remain in its original form. The declaration of the defendant's mental disorder and the appointment of the plaintiffs as committee of the person and estate of the defendant would remain suspect. The plaintiffs and the other family members of the defendant only had the defendant's best interests at heart when they applied for the ex parte order dated 10 January 2007 under the said Act 615 in the light of the defendant's incapacitated condition. The nature of the prayers sought in the present application in encl 10 would preserve the substantive rights of the parties.

F

[37] There is a real risk that the ex parte order dated 10 January 2007 in its original form and the first judgment which has since been reported may be relied upon by other litigants and legal practioners intending to lawfully apply for a declaration of a patient's mental incapacity. These prospective litigants would be misled into thinking or assuming that the said Act 615 is in force when it is not. Such a predicament can easily be avoided if I were to allow the prayers in encl 10. In my judgment, this is a fit and proper case requiring the exercise of this court's inherent jurisdiction to vary, alter, substitute and/or amend the ex parte order dated 10 January 2007 in order to reflect the corresponding sections in the Mental Disorders Ordinance 1952.

G

H

ARE SIMILAR RELIEFS PRESCRIBED UNDER THE MENTAL DISORDERS ORDINANCE 1952?

I

[38] I would answer this question in the positive. And I will now reproduce the corresponding sections relied upon in encl one (1) in tabulated form for ease of reference.

Mental Health Act 2001 (Act 615) (the said Act 615)	Mental Disorders Ordinance 1952
Court may order inquiry Section 52(1) '.....and alleged to be mentally disordered is incapable of managing himself and his affairs due to such mental disorder.'	3. Court may order inquiry Section 3(1) '……alleged to be mentally disordered is or is not of unsound mind and incapable of managing himself and his affairs:'
Section 52(2) 'The order of the Court under subsection (1) may also contain directions for inquiries to be made concerning – (a) the nature of the property belonging to the person alleged to be mentally disordered; (b) the persons who are his relatives; (c) the period during which he has been mentally disordered; or (d) such other questions as the Court deems proper.'	Section 3(2) 'Such order may also contain directions for inquiries concerning the nature of the property belonging to the person alleged to be mentally disordered, the persons who are his relatives or next of kin, the time during which he has been of unsound mind or such other questions as the Court shall seem proper.'
Section 52(3) 'The application for such an inquiry may be made by a relative of the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application.'	4. Application, by whom made. Section 4 'Application for such inquiry may be made by any person related by blood or marriage to the person alleged to be mentally disordered, or by any public officer nominated by the Minister for the purpose of making the application.'
Appointment of committees Section 58(1) 'If the Court finds that the person who is alleged to be mentally disordered is incapable of managing himself and his affairs due to his mental disorder, the Court may appoint a committee or committees of the person and of the estate of the person and may, as the Court deems fit, make an order – (a) as to the remuneration, if any, of the committee or committees out of the person's estate; or (b) as to the giving of security by the committee or committees.'	10. Appointment of committees. Section 10(1) 'If the Court finds that the person who is alleged to be mentally disordered is of unsound mind and incapable of managing himself and his affairs, the Court may, if it shall think fit, appoint a committee or committees of the person and estate of such person and may make such order, if any, as to the remuneration of the committee or committees out of such person's estate, and as to the giving of security by the committee or committees, as to the Court may seem fit.'
Section 58(2) 'Where the Court finds that the person alleged to be mentally disordered is incapable of managing his affairs due to his mental disorder but is not dangerous to himself or to others, the Court may appoint a committee of his estate without appointing a committee of his person.'	Section 10(2) 'If the Court finds that the person who is alleged to be mentally disordered is incapable of managing his affairs, but is not dangerous to himself or to others, the Court may appoint a committee of his estate, without appointing a committee of his person.'

Orders may be made on application Section 62 'Subject to this Act, the Court may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just but no order for costs shall be made under this section against any public officer.'	15. Orders may be made on petition. Section 15 'The Court may, on application made to it by petition concerning any matter whatsoever connected with the inquiry, make such order, subject to the provisions of this Ordinance, respecting the application and the costs thereof and of the consequent proceedings as shall under the circumstances seem just.'
Dealing with mentally disordered person's property Section 63 'The Court may, if it appears to the Court to be just or for the benefit of the mentally disordered person, order that any property, movable or immovable, and whether in possession, reversion, remainder, contingency or expectancy, be sold or charged or otherwise disposed of as seem most expedient for the purpose of raising money to be applied for any of the following purposes: (a) the payment of his debts, including any debt or expenditure incurred for his maintenance or for his benefit; (b) the discharge of any encumbrance on his estate; (c) the payment of or provision for the expenses of his future maintenance and the maintenance of his family, including the expenses of his removal to any place in or outside Malaysia and all related expenses; (d) the payment of the costs of any proceedings under this Act and of any costs incurred by order or under the authority of the Court.'	16. Dealing with mentally disordered person's property for certain purposes. Section 16 'The Court may, if it appears to be just or for the benefit of the mentally disordered person, order that any property, moveable or immoveable, and whether in possession, reversion, remainder, contingency or expectancy, be sold, charged by way of mortgage, or otherwise disposed of as may seem most expedient for the purpose of raising money to be applied for any of the following purposes: (a) the payment of his debts, including any debt incurred for his maintenance or otherwise for his benefit; (b) the discharge of any incumbrance on his estate; (c) the payment of or provision for the expenses of his future maintenance and the maintenance of his family, including the expenses of his removal to Europe, India, China or elsewhere, when he shall be so removed, and all expenses incidental thereto: (d) the payment of the costs of any proceeding under this Ordinance and of any costs incurred by order or under the authority of the Court.'
Committee to execute instrument Section 64(1) 'The committee of the estate of a mentally disordered person shall, in his name and on his behalf, execute all such conveyances and instruments of transfer in relation to any sale, charge, or other disposition of the estate of the mentally disordered person as may be ordered by the Court.'	17. Committee to execute instruments. Section 17 'The committee of the mentally disordered person's estate shall, in his name and on his behalf execute all such conveyances and instruments of transfer, relative to any sale, charge, mortgage or other disposition of his estate as the Court shall order. ……'

Section 64(2) 'The committee shall also, under the order of the Court, exercise all powers vested in a mentally disordered person, whether the powers are vested in him for his own benefit or in his capacity as a trustee or guardian.'	Section 17 '……..In like manner such committee shall, under the order of the Court, exercise all powers whatsoever vested in a mentally disordered person, whether the same are vested in him for his own benefit or in the character of trustee or guardian.'
Transfer of property of mentally disordered person residing outside Malaysia Section 70 'Where any property situated in Malaysia is standing in the name of or vested in any person residing outside Malaysia, the Court, if satisfied – (a) that the person has been declared to be a mentally disordered person; and (b) that his personal estate has been vested in a committee, curator or manager according to the laws of the place where he is residing, may order some fit and proper person to make such transfer of the property or of any part of the property to the committee, curator or manager or otherwise, and also to receive and pay over any proceeds or profits of the property as the Court deems fit; and any act done in pursuance of the order shall be valid and effectual for all purposes.'	23. Transfer of property of mentally disordered person residing out of the Federation. Section 23 'Where any property situate in the Federation is standing in the name of or vested in any person residing out of the Federation, the Court, upon being satisfied that such person has been declared of unsound mind and that his personal estate has been vested in a committee, curator or manager according to the laws of the place where he is residing, may order some fit person to make such transfer of the property, or of any part thereof, to such committee, curator or manager or otherwise, and also to receive and pay over any proceeds or profits thereof as the Court may think fit; and any act done in pursuance of such order shall be valid and effectual for all purposes.'
LAWS OF MALAYSIA Act 615 MENTAL HEALTH ACT 2001 'An Act to consolidate the laws relating to mental disorder and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered and for related matters.	THE MENTAL DISORDERS ORDINANCE 1952 (No 31 of 1952) 'An Ordinance to consolidate the law to regulate proceedings in cases of mental disorder, and to provide for the reception and detention of persons of unsound mind in mental hospitals. [29 July 1952.]'
Interpretation 2. (1) In this Act, unless the context otherwise requires – Section 2 'mental disorder' means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and 'mentally disordered' shall be construed accordingly;	No definition of unsound mind or mental disorder.

Interpretation 51. In this part – Section 51 'mentally disordered person' means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs.	2. Interpretation. In this Ordinance, unless the context otherwise requires – Section 2 'mentally disordered person' in Part I of this Ordinance means any person found by due course of law to be of unsound mind and incapable of managing himself or his affairs and in parts II and III of this Ordinance means any person of unsound mind and any person being an idiot;'

[39] Now, it can be said that the said Act 615 and the Mental Disorders Ordinance 1952 are similar in substance and form in that the provisions as reproduced above are intended by the legislature, inter alia, to cater for inquiries into mental disorders and to prescribe the relevant remedies for the appointment of a committee of the person and estate of persons found to be mentally disordered. It must be borne in mind that the legislative intent is what a legislature as a whole had in mind when it passed a particular statute. It is quite usual that any given statute is interpreted by just looking at the statute's language and no more. But, when the language employed is ambiguous or unclear, then the duty of the court is to interpret those words as intended by the legislature. It is quite apparent that from the tabulated columns highlighted above, Parliament does not intend to differentiate between the Act and the Ordinance and have instead tweaked Part X of the said Act 615 to bring it up to date with modern times in order to cater for the changes in societal norms.

[40] Whilst it is regrettable that the said Act 615 is not yet in force, the provisions of the Mental Disorders Ordinance 1952 are nevertheless in substance, on all fours with the provisions of the said Act 615. The provisions of the said Act 615 as referred to in the ex parte order dated 10 January 2007 can and ought to be varied or altered so that it would be in line with the corresponding provisions of the Mental Disorders Ordinance 1952 which is currently in force. The definition of 'mental disorder' in the said Act 615 as alluded to above is a more modern and socially acceptable description or expression of the term 'unsound mind' and the absence of such a definition in the Mental Disorders Ordinance 1952 does not mean that a less comprehensive definition should be adopted (see *Wan Chon v Chua Ka Bu* [1990] 2 MLJ 460).

[41] The intention of the plaintiffs in securing the ex parte order dated 10 January 2007 is heart warming. They wish to ensure the continuous care, treatment, rehabilitation and protection of the defendant to the extent that they have sold off their Housing Development Board's flat for a house in Telok Kurau, Singapore. Even the proceeds of sale of the defendant's 3/18th share of the plot of land in Malacca by the plaintiffs in their capacity as committee of the person and estate of the defendant would assist in meeting the expenses incurred for the continued care and medication of the defendant in the nursing home in Singapore.

[42] The ex parte order dated 10 January 2007 in its original form leaves the declaration of the defendant's mentally disordered state of mind and inability to care for himself in a limbo despite the existence of a similar order by the High Court of

Singapore. The appointment of the plaintiffs as the committee of the defendant's person and estate is uncertain leaving the plaintiffs' and third parties dealing with them unsure of their actions. The justice of the case requires a variation, alteration, substitution and/or amendment of the ex parte order dated 10 January 2007 in order to reflect the provisions of the Mental Disorders Ordinance 1952. And that is what encl 10 is all about. I certainly have the jurisdiction to entertain the present application in encl 10 pursuant to O 28 r 4(1) of the RHC and pursuant to the inherent jurisdiction of this court.

Application allowed.

Reported by Daphne Sebastian